Petition

81-1961

No. 81-____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1981

STATE OF IDAHO, ex rel.
GORDON C. TROMBLEY, Director
Department of Lands
CLEARWATER-POTLATCH TIMBER
PROTECTIVE ASSOCIATION,
Petitioners,

vs.

UNITED STATES OF AMERICA

and

KELLY WHITE, d/b/a WHITE
CONSTRUCTION COMPANY,
Respondents.

On Petition for A Writ of Certiorari To The United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether fire suppression costs incurred to prevent additional property damage constitute "money damages" "for injury or loss of property" under the Federal Tort Claims Act where

   a. Fire suppression costs are not excluded under the FTCA;

   b. The United States may recover for fire suppression costs under state law.

2. Whether pendent and/or ancillary jurisdiction could be exercised over a claim against the United States' contractor under the Federal Tort Claims Act where

   a. The claims against the United States and its contractor arose out of the same forest fire;

   b. The interpretation and effect of the Government's contract, and inspection and approval of the contractor's compliance were essential elements of the claim against both the United States and its contractor;

   c. The absence of either the United States or its contractor in a single trial would place the petitioners at a serious disadvantage.

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PETITION FOR A WRIT OF CERTIORARI

OPINION AND JUDGMENT BELOW

The order granting the United States Motion for Involuntary Dismissal under Rule 41(b), Fed. R. Civ. P., in the Federal Court for the District of Idaho, issued September 19, 1980, was unreported. It appears at Page 1 of the Appendix. The Judgment dismissing the complaint on its merits against the contractor, Kelly White, in the Federal Court for the District of Idaho, issued on September 8, 1980, was also unreported. It appears at Page 3 of the Appendix.

The Opinion of the United States Court of Appeals for the Ninth Circuit, No. 80-3415, affirming the dismissal of the claim for fire suppression costs and dismissing the claim against White for lack of jurisdiction, was entered and filed on January 28, 1982. It appears at Page 5 of the Appendix.

JURISDICTION

The Judgment of the United States Court of Appeals for the Ninth Circuit, No. 80-3415, was entered on January 28, 1982. The jurisdiction of this court is invoked pursuant to 28 U. S. C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

Art. 3, § 2, Par. 1 of the United States Constitution, provides in part:

> The judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States . . . ;—to controversies to which the United States shall be a party; . . .—between a state and citizens of another state. . . .

Title 28, U. S. C. § 1346 (b) provides in part:

> . . . The District Court . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, . . . for injury or loss of property, for personal injury or death caused by the negligent or wrongful act or omission of any employee of government while acting within the scope

> of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Title 28 U. S. C. § 2674, provides in part:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

Idaho Code § 38-107 appears at Page 12 of the Appendix.

Rule 601.01, Idaho Department of Lands, effective July 15, 1974, appears at Page 12 of the Appendix.

STATEMENT OF THE CASE

On September 1, 1974, a fire, which became known as the Gold Creek Fire, began from the location of Campsite 36.1 on land owned and maintained by the United States Department of Army, Corps of Engineers. This campsite was one of approximately 200 minicamps within the Corps' recreational project adjacent to the Dworshak Reservior. The Gold Creek Fire damaged public school trust lands in the sum of $1,764.72 and threatened a section (640 acres) of public school timberlands within one-half mile from the burn area and over 4,000 acres of public school trust lands within five miles of the area of the burn. The State of Idaho expended $153,098.55 for fire suppression incurred in order to prevent further damage to nearby public school trust lands. CR 93, Ap-

pendix, Pages 15, 17; RT 59, 60.[1] The State of Idaho and the Clearwater-Potlatch Timber Protective Association (Association), after denial of their Administrative claim, filed suit under the Federal Tort Claims Act (FTCA). Defendants were the Army Corps of Engineers, Kelly White (the Corps' contractor), and John Willey (camper)[2]. In their complaint, the State and Association alleged jurisdiction over the Corps under 28 U. S. C. §§ 1346(b) and 2671 *et sequitur* (FTCA) and over Kelly White by reason of ancillary jurisdiction.[3] CR 22.

Prior to the Gold Creek Fire, respondent, Department of Army, Corps of Engineers, prepared a contract with specifications for the construction of recreational facilities adjacent to the Dworshak Reservior. Plans for the minicampsites and specifications and drawings for materials to be used and the manner and method for the installation of fireplaces to be located therein were attached to the contract. Exhibits 4, 5; CR 93. Respondent, Kelly

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[1]CR refers to the Clerk's Record. RT refers to the Reporter's Transcript.

[2]Petitioners' complaint against the camper, John Willy, was dismissed in the District Court for lack of independent jurisdiction and the Ninth Circuit's rejection of pendent jurisdiction. CR 23, 93, Appendix, Page 13. Petitioners determined that it was not economical to appeal or to pursue the claim against John Willey by filing a separate action in State court.

[3]The Pre-Trial Conference Order stipulated jurisdiction over Kelly White under 28 U. S. C. § 1332 (Diversity of Citizenship), by reason of his residence in the State of Washington and that the amount in controversy exceeds $10,000.00. CR 93, Appendix, Pages 14, 17. The Opinion by the Court of Appeals is silent regarding this information. However, since the court held that the record revealed no independent basis of federal jurisdiction over White, presumably the court ruled that the State of Idaho was not a citizen for diversity purposes. See *Moor v. County of Alameda*, 411 U. S. 693, 717, *infra*.

White, agreed to this contract with the Corps of Engineers and completed construction and installation of the campsites and fireplaces. Exhibit 4. The Corps of Engineers purportedly inspected each campsite, including 36.1, and signed a statement of acceptance and approval of White's labors. Exhibits 22, 23.

The District Court dismissed petitioners' claim for fire suppression costs under the holdings of *Oregon v. United States,* 300 F. 2d 568 (9th Cir. 1962), cert. denied, 372 U. S. 941, 9 L. Ed. 2d 967, 83 S. Ct. 934 (1963), and *California v. United States,* 307 F. 2d 941 (9th Cir. 1962), cert. denied, 372 U. S. 941, 9 L. Ed. 2d 967, 83 S. Ct. 933 (1963). These cases held that fire suppression costs were not "money damages" "for injury or loss of property" under the FTCA. The District Court also granted judgment dismissing petitioners' complaint on the merits against respondent, Kelly White. CR 97, 98, Appendix, Pages 1, 3. The United States Court of Appeals, for Ninth Circuit, affirmed the decision of the District Court, stating that fire suppression costs are not "money damages" "for injury or loss of property" under the Federal Tort Claims Act. The Court of Appeals further held that the District Court lacked jurisdiction over Kelly White, that the record showed no independent basis of jurisdiction and that the Ninth Circuit had consistently rejected pendent jurisdiction.

Petitioners' claim was based upon the alleged negligence of the United States and Kelly White. Since the District Court dismissed the fire suppression claim against the Corps, and the Court of Appeals affirmed the dismissal, solely upon the precedent of the *Oregon* and *California* cases, *supra,* and since neither court ruled upon the suffi-

ciency of proof of negligence or the reasonableness of mitigation costs, these matters are not at issue before this court. The Court of Appeals' decision in effect held, that even upon a showing of negligence and the reasonableness of mitigation expenses, fire suppression costs are excluded under the FTCA.

SUMMARY OF ARGUMENT

Certiorari should be granted for the following reasons:

Fire suppression costs are "money damages" "for injury or loss of property" under the FTCA. The creation of an additional exception under the FTCA to exclude fire suppression costs conflicts with decisions of this court. The denial of mitigation costs conflicts with decisions of other federal courts.

Pendent and/or ancillary jurisdiction may properly be exercised over a claim against a United States' contractor under the FTCA. The Court of Appeals' rejection of pendent jurisdiction conflicts with the decisions of this court and other Courts of Appeal.

ARGUMENT

I. Fire Suppression Costs are "money damages" "for injury or loss of property" under the FTCA.

A. The creation of an additional exception to exclude recovery for fire suppression costs, conflicts with the intent of Congress and the decisions of this Court.

As remedial legislation, the FTCA should be liberally construed to effectuate the intent of Congress. *United States v. Yellow Cab Co.*, 340 U. S. 543, 95 L. Ed. 523, 71 S. Ct. 399 (1951). Congress included in the FTCA certain express exemptions which should not be extended or altered by judicial interpretation. *Rayonier, Inc. v. United States*, 352 U. S. 315, 320, 1 L. Ed. 2d 354, 77 S. Ct. 374 (1957); *United States v. Muniz*, 374 U. S. 150, 10 L. Ed. 2d 805, 83 S. Ct. 1850 (1963). The House report on the bill which became the FTCA declared:

> The present bill would establish a uniform system authorizing the administrative settlement to small tort claims and permitting suit to be brought *on any tort claim . . . with the exception of certain classes of torts expressly exempted from operation of the Act.*

HR No. 1287, 79th Cong. 1st Sess. 3 (1945), quoted in *Winston v. United States*, 305 F. 2d 253 (2nd Cir. 1962) aff'd., *United States v. Muniz, supra.* (Emphasis by the court.)

None of the 13 exceptions under the FTCA excludes recovery for fire suppression costs. 28 U. S. C. § 2671 *et sequitur.*

The proper test to determine whether a claim is actionable under the FTCA was applied in *Muniz, supra.* In that case, this court examined legislative intent, the specific exemptions and the express language of the act. The court found no direct exemption for claims by prisoners and concluded that such a claim was actionable under the Act. In accord, *Winston v. United States, supra,* (2nd Cir. 1961). Clearly, the Court of Appeals erroneously created an exception to the FTCA to exclude petitioners' claim for fire suppression costs.

In the absence of a pertinent exception, a federal court should determine whether the claim is actionable under state law. The FTCA waives sovereign immunity for tort liability "under circumstances where the United States, if a person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U. S. C. § 1346 (b). Thus, under the FTCA, a tort is defined by and damages are determined under State law. *Hatahley v. United States,* 351 U. S. 173, 100 L. Ed. 1065, 76 S. Ct. 745 (1956); *Richards v. United States,* 369 U. S. 1, 7 L. Ed. 2d 492, 82 S. Ct. 585 (1962); Annotation, 7 L. Ed. 2d 994. The FTCA deals with whether the United States may be sued for certain torts; it does not define what are torts. State law defines the tort. *Aretz v. United States,* 604 F. 2d 417, 431, Note 18 (5th Cir. 1979); *Contemporary Mission, Inc. v. United States Postal Service,* 648 F. 2d 97, 105 (2nd Cir. 1981). After determining whether the cause of action is a tort under State law, the federal courts have made sweeping application of the State Law of Damages. *Birnbaum v. United States,* 588 F. 2d 319, 322 (2nd Cir. 1978).

The State of Idaho adheres to the principle of awarding the cost of mitigating property damage. *Casey v. Nampa and Meridian Irrigation District,* 85 Idaho 299, 379 P. 2d 409 (1963). Idaho law further provides that the person or entity negligently responsible for a forest fire is liable for fire suppression costs. Idaho Code § 38-107; Rule 601.01, Idaho Department of Lands, effective July 15, 1974, Appendix, Page 12. Fire Suppression costs are recoverable under the common law of Idaho. *Spokane International Ry. Co. v. United States,* 72 F. 2d 440 (9th Cir. 1934). Hence, the District Court in an FTCA case,

applying Idaho law, could properly award fire suppression expenses as mitigation costs. 28 U. S. C. §§ 1346 (b), 2674.

B. The denial of mitigation costs conflicts with decisions of other federal courts.

The principle of mitigating damages is fundamental to the law of torts and is universally accepted. *Restatement of Torts* 2d, § 919. The rationale is succinctly stated as follows:

> The law serves its end of fostering the conservation of human and material resources of the community and discouraging unnecessary waste in two ways. The first way, that of denying recovery for avoidable damage, . . . corollative and complementary to this is the device of encouraging the injured party to avert loss by allowing him to recover for expense or injury incurred in the course of his efforts in that direction.

McCormick on Damages, § 42.

Following this rationale, federal courts have awarded mitigation costs in FTCA cases. For example, the State Road Department of Florida recovered mitigation costs for constructing and removing temporary detour bridges constructed to keep a state highway open to traffic while a permanent structure was being repaired. *State Road Department v. United States,* 78 F. Supp. 278 (D. C. N. D. Fla. 1948), aff'd 189 F. 2d 591 (5th Cir.), cert. den. 342 U. S. 907, 96 L. Ed. 676, 72 S. Ct. 291; in accord, *Melton v. United States,* 488 F. Supp. 1066, 1075 (D. C. D. C. 1980); *Laney Tank Lines, Inc. v. United States* 237 F. Supp. 205-207 (E. D. S. C. 1965). This court has approved the principle of mitigation of damages in eminent domain proceedings. *United States v. Dickinson,* 331 U. S. 745, 751, 91 L. Ed. 2d 1789, 67 S. Ct. 1382 (1947). In other non-

FTCA cases, the federal courts have also approved mitigation costs. *Robbins v. Farmers Union Grain Terminal Ass'n,* 552 F. 2d 788 (8th Cir. 1977) (action for Damage to Cattle); *Matter of Parkview-Gem, Inc.,* 465 F. Supp. 629 (W. D. Mo. 1979) (Bankruptcy Proceeding). In *Parkview-Gem,* the federal court declared:

> The general principle (of mitigation expenses) which is at least as old as Lord Ellenborough's decision in *Jones v. Boyce* (1816) 1 Start 493, and is familiar in ordinary . . . and extraordinary tort cases . . . as well as in the admiralty . . . and even in contract cases when special damages are foreseeable . . . (citations omitted), has been stated in these words in Restatements, Torts: § 919:
>
> > § 919 (1) A person whose legally protected interests have been endangered by the tortious conduct of another is entitled to recover for expenditures reasonably made or harm suffered in a reasonable effort to avert the harm threatened.
> >
> > (2) A person who has already suffered injury by the tort of another is entitled to recover for expenditures reasonably made or harm suffered in a reasonable effort to avert further harm.

465 F. Supp. 629, 637, quoting an earlier case (citation omitted).

This principle is a corollary to the doctrine which denies recovery for failing to make a reasonable effort to avoid foreseeable further damage. *Restatement of Torts,* 2d, § 918. In *Yarrow v. United States,* 309 F. Supp. 922 (S. D. N. Y. 1970), the Federal Court in an action under the FTCA held that the claimant was bound to mitigate damages and reduced the claimant's award accordingly. Thus, the federal courts in FTCA cases and in non-FTCA cases,

have required mitigation of damages and awarded mitigation costs as part of property damages.

In Idaho's case, the Gold Creek Fire damaged timberlands held in trust by the State and endangered thousands of acres of nearby trust lands. RT 59, 110. The State has a constitutional duty to preserve and protect these trust lands. Idaho Constitution, art. 9, sec. 8; *Lassen v. Arizona*, 385 U. S. 458, 17 L. Ed. 2d 515, 87 S. Ct. 584 (1967). Idaho law follows the majority rule of awarding mitigation expenses. *Casey v. Nampa & Meridian Irrigation District, supra.*

In light of these facts and under the holding by the Court of Appeals, petitioners are placed in an untenable dilemma: forbear fighting the fire, wait until their property is damaged, and sue for property damage under the FTCA; or fight the fire to minimize property loss but without recourse against the negligent federal agency. The first alternative is foreclosed as a matter of law, because the landowner who fails to prevent foreseeable damage cannot recover for such damage under the doctrine of mitigation of damages. *Restatement of Torts*, 2d, § 918. Moreover, this alternative is unconscionable for the obvious reason that an uncontrolled forest fire can result in potentially catastrophic damages to property, human death and injury. RT 61, 109; *Rayonier, Inc., supra*, at 319, 320. Yet, if the landowner elects to fight the fire to minimize such damages, he is denied recovery for fire suppression expenses (mitigation costs). The claimant thus is left with no remedy, contrary to the intent of Congress and the purpose of the FTCA.

C. The Court of Appeals allows the United States to recover fire suppression costs under Idaho law yet unfairly denies the same remedy to the State.

The Court of Appeals' holding unfairly defeats reciprocal recovery for fire suppression costs between the United States and the State. In 1934, the Ninth Circuit Court of Appeals affirmed a judgment in favor of the United States for fire suppression costs incurred in fighting a forest fire in northern Idaho. *Spokane International Ry. Co. v. United States*, 72 F. 2d 440 (9th Cir. 1934). The court held that under Idaho law, the *United States had a common law right to recover fire suppression costs.* The Fourth Circuit Court of Appeals has similarly upheld a recovery under state law by the United States against a railroad for fire suppression costs. *Chesapeake and Ohio Ry. Co. v. United States*, 139 F. 2d 632 (4th Cir. 1944); citing *Restatement of Torts*, § 919; *United States v. Chesapeake & Ohio Ry. Co.*, 130 F. 2d 308 (4th Cir. 1942). Despite its earlier decision in *Spokane Ry., supra*, the Court of Appeals for the Ninth Circuit rejected Idaho's claim against the United States for fire suppression costs. This inequitable disparity is unjustified. The FTCA should be liberally construed to afford a remedy for fire suppression costs as "money damages" where such are not excluded. *United States v. Muniz, supra.* The Act should be harmonized with the common law, statutes and judicial decisions of the state where the negligent act or omission occurred. *Richards v. United States, supra*, 7 L. Ed. 2d 492, 496, 499. The Court of Appeals' opinion is therefore contrary to the intent of Congress and decisions under the FTCA by this Court and other federal courts.

II. Pendent and/or ancillary jurisdiction may properly be exercised over a claim against a United States' contractor under the FTCA.

A. The opinion of the Court of Appeals rejecting pendent jurisdiction conflicts with the principles set forth in the decisions of this court.

The Court of Appeals has rendered a decision on a significant question of federal law which has not been, but which should be, resolved by this court. Pendent party jurisdiction is a "subtle and complex question with far-reaching implications." *Aldinger v. Howard*, 27 U. S. 1, 49 L. Ed. 2d 276, 96 S. Ct. 2413 (1976); *Moor v. County of Alameda*, 411 U. S. 693, 36 L. Ed. 2d 596, 93 S. Ct. 1785 (1973). Although the Ninth Circuit herein summarily rejected pendent jurisdiction on the basis of its previous holdings, its reasoning is explained in a very similar case under the FTCA, cited by the court, *Ayala v. United States*, 550 F. 2d 1196, 1200 (9th Cir. 1977), cert. granted 434 U. S. 814, 54 L. Ed. 2d 70, 98 S. Ct. 50, cert. dismissed, 435 U. S. 982, 56 L. Ed. 2d 76, 98 S. Ct. 1635 (1978). (Certiorari was dismissed at the request of the parties under Rule 60 because the case was settled. See Case No. 76-1610, April 19, 1978.) In *Ayala*, the Court of Appeals reasoned that in addition to the absence of Congressional disinclination to exercise pendent jurisdiction under a given statute, "there remains the constitutional hurdle of the limited federal jurisdictional grant of art. 3 to be leaped . . .". 550 F. 2d 1196, 1199. The Court of Appeals concluded that it was not bound by new dictum in *Aldinger* and reaffirmed its prior holdings "until the Supreme Court directly confronts the single, 'subtle and complex question with far-reaching implications' posed by pendent

party jurisdiction." *Ayala,* 550 F. 2d 1196, 1200. The Court of Appeals thus construed the question of power to exercise pendent jurisdiction as involving both constitutional and statutory inquiries. Accordingly, petitioners seek review upon both constitutional and statutory issues because both are significant, unresolved, questions of federal law. See *Aldinger, supra,* 49 L. Ed. 2d at 288, Note 13.

In FTCA cases, the federal anchor is definitely substantial. A federal district court persuasively stated the reasoning for the exercise of pendent jurisdiction in an action under the FTCA:

> This is a case in which federal question jurisdiction is not only substantial, but exclusive. The Federal Tort Claims Act is designed to provide relief to those damaged by Government negligence.
>
> It is true that the substantive policies involved are those of state law, but the extent to which Congress intended the Government to become liable, see 28 U. S. C. § 2679 (b, c), evinces a policy of complete relief for the injured party. This policy is separate from, but coordinate with, the strong benefits in judicial economy that joinder would accomplish here. . . .
>
> The principles behind the complete diversity rule—limiting the federal case load—will not be served by refusing joinder. . . . If this were an ordinary diversity case, the court would find it difficult to justify asserting jurisdiction. The involvement of the United States and its alleged agents indicates that this is the proper forum for full relief, however.

Jacobs v. United States, 367 F. Supp. 1275, 1283 (D. C. Ariz. 1973); in accord, *Hipp v. United States,* 313 F. Supp. 1152 (E. D. N. Y. 1970), cited in *Aldinger v. Howard, supra,* 49 L. Ed. 2d 276, 288, Note 13.

Since petitioners claimed damage to their property (which was not contested), CR 93, Appendix, Page 17, in addition to their claim for fire suppression costs, the substantiality of the federal anchor under the FTCA is beyond dispute. 28 U. S. C. § 1346(b), 2674.

Petitioners alleged ancillary jurisdiction over the United States' contractor, Kelly White. It is unnecessary to determine " . . . whether there are any 'principled' differences between pendent and ancillary jurisdiction . . ." *Owen Equipment & Erection Co. v. Kroger*, 437 U. S. 365, 57 L. Ed. 2d 274, 98 S. Ct. 2396 (1978). The Court of Appeals for the Ninth Circuit referred to Petitioners' allegation as pendent jurisdiction.

Ancillary jurisdiction developed historically as a means to enable a federal court to adjudicate the rights of all persons to a common fund or property in a case in which the federal court had jurisdiction. *Aldinger v. Howard, supra.* Pendent jurisdiction evolved as a means for a plaintiff to litigate both federal and state law claims in federal court, where the two claims were so closely related that they would ordinarily be disposed of in one lawsuit. *Aldinger v. Howard, supra.* In *Moor v. County of Alameda, supra,* this Court alluded to potential cases in which it would be appropriate to join new parties as well as new claims where the plaintiff has asserted a federal claim. This court has not specifically decided the issue of whether pendent and/or ancillary jurisdiction could be exercised over a claim against a United States' contractor under the FTCA. The dicta of *Aldinger, supra,* however, indicate a favorable response to such jurisdiction in a FTCA case:

> Other statutory grants and other alignments of parties and claims might call for a different result. When the grant of jurisdiction to a federal court *is exclusive,* for example, *as in the prosecution of tort claims against the United States under* 28 U. S. C. § 1346, the argument of judicial economy and convenience can be coupled with the additional argument that *only in a federal court may all the claims be tried together.*

Aldinger, 427 U. S. 1, 18, 49 L. Ed. 2d 276, 288 (footnote omitted; emphasis supplied).

Such dicta, rejected by the Court of Appeals as nonbinding, nevertheless reflects the holding of this court in *United States v. Gibbs,* 383 U. S. 715, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966). That decision established the preliminary standard for the exercise of pendent jurisdiction in the context of judicial power:

> Pendent jurisdiction, in the sense of judicial *power,* exists whenever there is a claim "arising under (the) Constitution, the laws of the United States, and treaties made, or which shall be made under their authority . . .," United States Constitution, art. 3, § 2, and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional case. . . . The state and federal claims must arise from a common nucleus of operative fact, but if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues there is *power* in Federal Court to hear the whole.

383 U. S. 715, 725 (emphasis in original).

Petitioners' claims against the United States and its contractor, Kelly White, arose from a common nucleus of operative fact, specifically, from the same forest fire.

The interpretation and effect of the government contract, and inspection and approval of the contractor's compliance, were essential elements of the claim against both the United States and its contractor. CR 93, Appendix, Pages 15, 16. The absence of either the United States or its contractor in a single trial would place the petitioners at a serious disadvantage, and justice may not be served. The Federal Court is the only forum which can exercise jurisdiction over both the federal and the state law claims. Thus, the petitioners have satisfied the preliminary standard for pendent jurisdiction established in *Gibbs, supra.*

A concern in exercising pendent jurisdiction is the potential for increasing the workload of federal courts. In actions under the FTCA, such as in the instant case, it is unlikely that additional issues or parties will be adjudicated in the federal court. In FTCA cases, the issues of negligence, proximate cause, apportionment of damages and the effect of third-party defendants and cross-defendants will be directly or indirectly before the court. In petitioners' case, the contractor, Kelly White, was before the court on cross-claims between White and the United States concerning responsibility and liability under their contract and potential apportionment of damages. CR 93.

B. The opinion of the Court of Appeals conflicts with the decisions of other Courts of Appeal.

The Fifth Circuit Court of Appeals approved pendent jurisdiction in an action under the FTCA following the standard in *Gibbs,* in *Florida East Coast Ry. Co. v. United States,* 519 F. 2d 1184 (1975). In cases decided after *Aldinger* and *Moor,* the Fifth and First Circuits

affirmed the exercise of pendent jurisdiction over a state law claim involving a non-federal party under the FTCA. *Dick Meyers Towing Service, Inc. v. United States,* 577 F. 2d 1023 (5th Cir. 1978); *Ortiz v. United States,* 595 F. 2d 65 (1st Cir. 1979).

A recent decision by a federal district court accurately applied the principles set forth in *Gibbs, Aldinger* and *Moor, supra. Ausland v. United States,* 488 F. Supp. 426 (N. D. S. D. 1980). The court stated:

> The majority of Courts of Appeal have held that where federal jurisdiction over the federal claim is exclusive, as under the Federal Tort Claims Act, the argument that the federal court is the only court that can handle all the claims should lead to jurisdiction over additional parties, in line with the *Aldinger* quote above.

Ausland, 488 F. Supp. 426, 429, referencing dicta in *Aldinger,* 49 L. Ed. 2d 276, 288.

Noting the Ninth Circuit's decisions to the contrary, the court held that a federal court had the power to exercise pendent jurisdiction, citing precedents from the Court of Appeals for the Eighth Circuit (citations omitted). The court concluded that pendent jurisdiction was a proper exercise of its discretion in the interests of judicial economy and convenience to the parties.

In other cases involving a substantial federal question, the Courts of Appeals have consistently approved pendent jurisdiction over state law claims and nonfederal parties in non-diversity actions. *Morrissey v. Curran,* 567 F. 2d 546, 549, Note 11 (2nd Cir. 1977); *Smith v. No. 2 Galesburg Crown Finance Corp.,* 615 F. 2d 407 (7th Cir. 1980); *Conroy v. Conroy,* 575 F. 2d 175 (8th Cir. 1978);

Transok Pipeline Co. v. Darks, 565 F. 2d 1150 (10th Cir. 1977); *Milhouse v. Levi*, 548 F. 2d 357 (D. C. Cir. 1976). Clearly, in the context of petitioners' claims against the Corps and its contractor, under the FTCA and pendent jurisdiction, the decision by the Court of Appeals for the Ninth Circuit directly and unjustifiably conflicts with the vast majority of decisions by other Courts of Appeal and principles established by this court.

CONCLUSION

The Petition for Certiorari should be granted to settle significant questions of federal law and to resolve a substantial conflict between the Ninth Circuit and other federal courts on the issues of recovery for fire suppression costs and pendent jurisdiction under the Federal Tort Claims Act.

Respectfully submitted,

L. MARK RIDDOCH
Deputy Attorney General
Department of Lands
State of Idaho

CERTIFICATE OF MAILING

I hereby certify that on this 21st day of April, 1982, that a true and correct copy of the foregoing PETITION FOR WRIT OF CERTIORARI was mailed by depositing the same in a U. S. Post Office or mailbox, first-class, postage prepaid, to Solicitor General, Department of Justice, Washington, D. C. 20530; and Jerry V. Smith, Esquire, 508 Eighth Street, Lewiston, Idaho 83501, which are the only parties required to be served.

L. MARK RIDDOCH
Deputy Attorney General

Appendix

APPENDIX

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

Civil No. 77-2045

STATE OF IDAHO, ex rel. GORDON C. TROMBLEY, DIRECTOR, DEPARTMENT OF LANDS AND CLEARWATER-POTLATCH TIMBER PROTECTION ASSOCIATION,

Plaintiff,

v.

UNITED STATES OF AMERICA; KELLY WHITE d/b/a WHITE CONSTRUCTION CO.,

Defendant.

ORDER GRANTING MOTION FOR INVOLUNTARY DISMISSAL UNDER RULE 41 (b), FED. R. CIV. P.

ORDER

(Filed September 19, 1980)

This case came on for court trial at 9:30 a.m. on August 27, 1980. At the close of plaintiff's case, the United States moved to dismiss plaintiff's claim for fire fighting costs pursuant to Rule 41 (b) of the Federal Rules of Civil Procedure.

The Court finds that the United States' motion is well taken under Ninth Circuit authority. *Oregon v. United States,* 308 F. 2d 568 (9th Cir. 1962); *California v. United States,* 307 F. 2d 941 (9th Cir. 1962).

Further, the plaintiff entered into a contract to suppress fires starting on land owned by the Army Corps of Engineers, and, as part of that contract, agreed that ". . . each party [would waive] all claims of any kind or nature

against the other party . . . for compensation for loss, damage . . . occurring in consequence of the performance of [the] contract." (Article 4 of the Fire Suppression Contract.) Plaintiff's claim for fire suppression costs, even if it were not barred by Ninth Circuit authority, "occurred in consequence of the performance of [the] contract" and is [there]by not recoverable under Article 4.

Dismissal of plaintiff's claim for fire fighting costs leaves an unresolved claim for $1,764.72 in property damage to state land. The Court having been apprised that the claim for property damage has been settled, it is therefore ORDERED,

That plaintiff's action against the United States shall be and hereby is dismissed with prejudice.

/s/ Ray McNichols
Ray McNichols, Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO CENTRAL DIVISION

CASE NO. CIV-77-2045

STATE OF IDAHO, ex rel. GORDON C. TROMBLEY, Director, Dept. Lands and CLEARWATER-POTLATCH TIMBER PROTECTIVE ASSOCIATION,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE ARMY, CORPS OF ENGINEERS, JOHN H. WILLY, KELLY WHITE, d/b/a WHITE CONSTRUCTION CO.,

Defendants.

JUDGMENT

(Filed September 8, 1980)

The issues in the above entitled action having been regularly brought on for trial at a term of this court and the parties having duly appeared by their respective attorneys and the allegations and proofs of the plaintiffs having been heard in support of plaintiffs' contentions, and the defendant, Kelly White d/b/a White Construction Company, having made a motion to dismiss the complaint at the conclusion of plaintiffs' case and due deliberation having been had and the court having made and filed its decision on the 8 day of September, 1980, containing findings of fact and conclusions of law thereon and directing a judgment in favor of the defendant Kelly White d/b/a White Construction Company, denying the relief as demanded in the complaint and finding no negligence on the part of defendant Kelly White d/b/a White Construction

Company, and no entitlement to damages in favor of the plaintiffs and dismissing the complaint on the merits, it is ORDERED, ADJUDGED AND DECREED that the complaint of the plaintiffs be and the same hereby is dismissed on the merits, and that the defendant Kelly White d/b/a White Construction Company recover their costs of the plaintiff in the sum of .

DATED this 8th day of September, 1980.

Jerry Clapp, Clerk

By /s/ Ray McNichols

STATE OF IDAHO, ex rel. Gordon C. TROMBLEY, Director, Department of Lands and Clearwater-Potlatch Timber Protective Association, Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF the ARMY, CORPS OF ENGINEERS; and Kelly White dba White Construction Company, Defendants-Appellees.

No. 80-3415.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Dec. 7, 1981.
Decided Jan. 28, 1982.

State of Idaho brought suit against United States Department of the Army and contractor, seeking to recover over $150,000 expended by State in extinguishing forest fire which had originated in fireplace located at "minicamp" which had been constructed by contractor and inspected and approved by Army Corps of Engineers. The United States District Court for the District of Idaho, Ray McNichols, J., dismissed cause against United States for failure to state a claim under Federal Tort Claims Act and concluded that contractor was not negligent in construction of minicamp and was at any rate exonerated from liability, and state of Idaho appealed. The Court of Appeals, Kilkenny, Circuit Judge, held that: (1) expenses incurred by State in fighting forest fire did not constitute "money damages" "for injury or loss of property" under Federal Tort Claims Act, and thus District Court lacked subject-matter jurisdiction with respect to claim against United States, and (2) District Court was without power to reach merits of claim against contractor.

Affirmed.

1. Federal Courts (Key) 431

Whether particular cause of action constitutes claim that is excluded from Federal Tort Claims Act is question of federal law. 28 U.S.C.A. §§ 1346 (b), 2671 et seq.

2. United States (Key) 78 (1)

Inquiry as to whether particular cause of action constitutes claim that is excluded from Federal Tort Claims Act is jurisdictional, and therefore, questions as to what acts constitute negligence under state law are irrelevant. 28 U.S.C.A. §§ 1346 (b), 2671 et seq.

3. United States (Key) 78 (10)

Expenses incurred by state of Idaho in fighting fire which origniated in fireplace located at "minicamp" which had been constructed by contractor and inspected and approved by United States Army Corps of Engineers did not constitute "money damages" "for injury or loss of property" under Federal Tort Claims Act, and thus district court lacked subject-matter jurisdiction with respect to claim of state of Idaho against the United States Department of the Army. 28 U.S.C.A. §§ 1346 (b), 2671 et seq.

See publication Words and Phrases for other judicial constructions and definitions.

4. Federal Courts (Key) 18

Where state of Idaho brought suit against United States and contractor seeking to recover money expended in extinguishing fire which originated in fireplace located at "minicamp" which had been constructed by contractor and inspected and approved by United States Army Corps of Engineers but where district court correctly dismissed

the cause against the United States for failure to state a claim under Federal Tort Claims Act since expenses incurred by State did not constitute money damages under the Act, district court was without power to reach merits of claim against contractor. 28 U.S.C.A. §§ 1346 (b), 2671 et seq.

5. Federal Courts (Key) 5

Federal courts are courts of limited jurisdiction.

Appeal from the United States District Court for the District of Idaho.

Before KILKENNY and GOODWIN, Circuit Judges, and TANNER,* District Judge.

KILKENNY, Circuit Judge:

FACTS

In 1968, the State of Idaho and the United States Army Corps of Engineers (Corps) entered into a fire suppression agreement. The United States paid an annual fee in return for Idaho's obligation, *inter alia*, to provide a system of fire protection for specified federal land in Idaho. The agreement contained the following clause:

> "*Article 4. Release of Claims for Damage*
>
> In consideration of the mutual benefits herein obtaining, each party hereto waives all claims of any kind or nature against the other party hereto for compensation or reimbursement for loss, damage, personal in-

---

*The Honorable Jack E. Tanner, United States District Judge for the Western District of Washington, sitting by designation.

jury, or death occurring in consequence of the performance of this contract."

A few years later, an unexpected heavy influx of outdoor recreationists motivated the Corps to devise a plan for a "minicamp" program that called for 205 campsites at 86 camping areas along the Dworshak Reservior. These minicamps were constructed by appellee Kelly White, d/b/a White Construction Company (White) pursuant to a detailed construction plan provided by the Corps. Each minicamp included a 20′ x 20′ pad cleared to mineral soil for a fireplace. Upon completion of the construction, the Corps inspected and approved the construction as being in compliance with its specifications.

On September 1, 1974, the Gold Creek fire started in the trees around the minicamp located at river mile 36.1 on the Dworshak Reservior. This fire, started by campers, originated in the fireplace located at the minicamp. How the fire spread from the fireplace to the trees, however, has never been determined. All parties agree that this fire originated on federal land covered by the terms of the 1968 agreement.

The State of Idaho expended over $150,000.00 in extinguishing this fire. Idaho filed this claim in federal court under the Federal Tort Claims Act, 28 U.S.C. § 1346 (b) (FTCA), alleging negligence on the part of both the United States and White. At the close of the appellants' case, both the United States and White moved to dismiss the State's claim pursuant to FRCivP 41 (b).

The court granted this motion and dismissed the case. As to the United States, the court found that Idaho did not state a valid claim under the FTCA and, in the alternative,

that Idaho had waived this type of claim in the 1968 agreement. As to White, the court found that the evidence did not establish that he was negligent in the construction of the minicamp and, in the alternative, that the inspection, acceptance and approval of the construction by the Corps exonerated White from liability.

DISCUSSION

A

[1, 2] The district court correctly dismissed the cause against the United States for failure to state a claim under the FTCA. Whether a particular cause of action constitutes a claim that is excluded from the FTCA is a question of federal law. *Laird v. Nelms,* 406 U. S. 797, 92 S. Ct. 1899, 32 L. Ed. 2d 499 (1972); *United States v. Neustadt,* 366 U. S. 696, 81 S. Ct. 1294, 6 L. Ed. 2d 614 (1961). The inquiry is jurisdictional, and, therefore, questions as to what acts constitute negligence under state law are irrelevant.

[3] The FTCA, 28 U.S.C. § 1346 (b), limits the jurisdiction of the district court to claims of "money damages" against the United States "for injury or loss of property." In *Oregon v. United States,* 308 F. 2d 568, 569 (CA9 1962), *cert. denied,* 372 U. S. 941, 83 S. Ct. 934, 9 L. Ed. 2d 967 (1963), we held that the FTCA did not confer jurisdiction on the district court for expenses incurred by a state or other agency in fighting a forest fire. Such expenses simply do not constitute "money damages" "for injury or loss of property" under the FTCA. *See also, People of California v. United States,* 307 F. 2d 941 (CA9 1962), *cert. denied,* 372 U. S. 941, 83 S. Ct. 933, 9 L. Ed. 2d

967 (1963). Appellants' attempt to classify these expenses as "mitigation costs" does not make them "money damages" within the statute.

The district court lacked subject matter jurisdiction, and, therefore, the judgment of the district court dismissing the claim against the United States is affirmed. Because this jurisdictional holding disposes of the state's case, we need not consider whether the state contractually waived this claim in the 1968 agreement.

B

[4] The decision to dismiss the claim as to White presents an additional jurisdictional problem. The district court found that the evidence did not establish that White had been negligent, and, in the alternative, that White had been exonerated by the approval of his construction by the Corps. The district court was without power to make this determination.

[5] It is axiomatic that the federal courts are courts of limited jurisdiction. The State of Idaho has attempted to have its state claim against White ride the coattails of its FTCA claim against the United States into federal court. In *Williams v. United States*, 405 F. 2d 951, 954 (CA9 1969), this court held that:

> "[I]n order for a claim against other parties to be joined properly with a claim against the United States under the Federal Tort Claims Act, an independent ground of jurisdiction must exist, and *the theory of pendent jurisdiction is not sufficient.*" [Emphasis added]

In addition, this court has consistently rejected the concept of "pendent party" jurisdiction. *Hymer v. Chai*, 407 F. 2d

136, 137 (CA9 1969); *Ayala v. United States*, 550 F. 2d 1196, 1200 (CA9 1977), *cert. granted*, 434 U. S. 814, 98 S. Ct. 50, 54 L. Ed. 2d 70, *cert. dismissed*, 435 U. S. 982, 98 S. Ct. 1635, 56 L. Ed. 2d 76 (1978); *Munoz v. Small Business Administration*, 644 F. 2d 1361, 1365 (CA9 1981).

The record clearly shows that there is not an independent basis of federal jurisdiction over the state negligence claim against White. Therefore, the district court was simply without power to reach the merits of that claim.

CONCLUSION

The judgment dismissing the claim against the parties is AFFIRMED. The district court lacked subject matter jurisdiction.

Idaho Code § 38-107 states:

> Any forest or range fire burning out of control or without adequate and proper precautions having been taken to prevent its spread, is hereby declared *a public nuisance,* by reason of its menace to life and/or property. Any person responsible through his conduct, acts and/or control of property or operations for either the starting or the existence of such fire is hereby required to make a reasonable effort to control or extinguish it immediately, without awaiting instructions from the state forester or a fire warden. *The state forester or any fire warden may summarily abate the nuisance* thus constituted by controlling or extinguishing such fire and *the person willfully or negligently responsible for the starting or existence of such fire shall be liable for the costs incurred by the state or its authorized agencies in controlling or extinguishing the same.* The amount of such costs shall be recovered by a civil action prosecuted in the name of the State of Idaho and any amounts recovered shall be paid to the state treasurer for deposit to the forest protection fund. Civil liability provided for herein shall be exclusive of and in addition to any criminal penalties otherwise provided. (Emphasis added.)

Rule 601.01 Idaho Department of Lands, effective July 15, 1974, prior to the Gold Creek Fire, states:

> Any person, as defined in Section 38-101, *Idaho Code,* willfully or negligently responsible through his acts, conduct or control of property or operations for either the starting or existence of any forest or range fire burning out of control or without adequate and proper precautions having been taken by him to prevent its spread shall be charged for the costs incurred by the State or its agents in controlling or extinguishing such fire. Such costs shall include, but are not necessarily limited to be, actual costs of the State for wages of fulltime personnel and use of equipment of the forest protective district or districts where the fire originated or burned.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

Civil No. 77-2045

STATE OF IDAHO, ex rel. GORDON C. TROMBLEY, Director, Department of Lands and CLEARWATER-POTLATCH TIMBER PROTECTIVE ASSOCIATION,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE ARMY, CORPS OF ENGINEERS, JOHN H. WILLY, KELLY WHITE, d/b/a WHITE CONSTRUCTION COMPANY,

Defendants.

PRE-TRIAL CONFERENCE ORDER (Excerpts)

(Filed August 27, 1980)

Following pre-trial proceedings pursuant to Rule 16 of the Federal Rules of Civil Procedure and Local Civil Rule 10 of this Court, IT IS ORDERED:

I.

Action for damages by plaintiffs State of Idaho and Clearwater-Potlatch Timber Protective Association against the United States of America and Kelly White d/b/a White Construction and John H. Willy; the latter having been dismissed from the case upon jurisdictional grounds.

Issues are raised by the complaint and the answers and cross-claims thereto as amended.

II.

Federal jurisdiction is invoked upon the following grounds:

1. Federal Tort Claims Act (28 U.S.C. Sec. 1346 (b), 2671 et seq.) as against defendant United States of America.

2. 28 U.S.C. Sec. 1332 as against defendant Kelly White d/b/a White Construction.

III.

ADMITTED FACTS AS TO CASE NO. 77-2045

1. Jurisdiction is admitted on the part of defendant United States of America except as to discretionary acts of defendant United States of America as provided in 28 U.S.C. Sec. 2680 and subject matter jurisdiction as to fire suppression costs. 28 U.S.C. Sec. 1346(b).

2. On August 4, 1976, plaintiff State of Idaho filed a claim for administrative settlement with the Department of the Army, Corps of Engineers pursuant to the requirements of 28 U.S.C. Sec. 2675, in the sum of $184,299.80. Said claim was delivered to the office of the Corps of Engineers, Walla Walla, Washington; the office of the Secretary of the Army, Washington, D.C.; the office of the Chief of the Corps of Engineers, Washington, D.C.; and to the office of the United States Attorney General, Washington, D.C.

3. The Department of the Army Corps of Engineers failed to make a final disposition of plaintiff's claim within six months after its filing.

4. The United States, Department of the Army, Corps of Engineers, constructed Dworshak Dam and Reservoir, together with Boat Access Recreation Facilities, said facilities being built upon lands owned and managed by the Department of Army, Corps of Engineers located

adjacent to Dworshak Dam Reservoir. The facility here involved, a campsite with fireplace, was situate on the northwesterly bank of the North Fork of the Clearwater River in Clearwater County, State of Idaho; more specifically, the only campsite located upon Gold Creek at River mile 36.1 as indicated by Corps of Engineers' site location photograph referred to as # DWG-1-0-10118, dated 72 April 18.

5. Plaintiff, State of Idaho, owns over 4,000 acres of state endowment lands within 5 miles of the area of the burn, including lands lying within Section 30, Township 40 North, Range 4 East, Boise Meridian, Idaho, near the recreational campsite hereinafter described and as illustrated by the map identified as Exhibit 10 and incorporated herein by reference Members of the Clearwater-Potlatch Timber Protection Association own over 15,000 acres of lands within five miles of the area of the burn, including lands near the recreational campsite hereinafter described.

6. The Department of Army, Corps of Engineers, prepared contract specifications for the construction of said recreational facilities, including therein campsites, specifying therein the materials to be used, the manner, method and design for the construction of fireplaces to be located within said campsites, as indicated by a contract, referred to as Contract No. DACW 68-73-C-0225 dated 73 June 05, a copy of which is Exhibit 4 in this case.

The Department of the Army, Corps of Engineers, also prepared drawings of the fireplaces to be installed, designated as Drawing # DW6-1-0-10/22. (Exhibit 5 in this case.)

7. Kelly White, d/b/a White Construction Company entered into the contract (Exhibit 4) with the Department of the Army, Corps of Engineers, to construct and install, according to said contract and its specifications, campsites and fireplaces within the said recreational facilities adjacent to said Reservoir.

8. The above described campsite, containing the fireplace here involved, was in an area which is heavily timbered, where the danger of fire is present during the major portion of the summer and early fall.

(Contractual provisions omitted.)

10. No other fire prevention measures were specified by the United States of America except as set forth in the contract and attached drawings; provided, however, the United States of America contends that the government inspector required the moving of some fireplaces because of overhanging tree limbs or nearness to trees.

11. John H. Willy, Allene Willy, Pat Willy, and Linda Spelts camped at the mini-camp at River Mile 36.1 on the night of August 31, 1974.

12. The Willy party lit a fire in the fireplace on September 1, 1974, and it burned from approximately 6:30 a.m. until at least the time John Willy, Allene Willy, and Pat Willy left the campsite to go fishing. Whether the fire was put out when the Willys left for fishing is in dispute.

13. At approximately 9:30 a.m. John Willy, Allene Willy, and Pat Willy left Linda Spelts in camp and went fishing in their boat

14. When the Willys left Linda Spelts in camp, Ms. Spelts informed them of her intention of going into the tent to read.

15. Ms. Spelts could not see the fireplace from inside the tent.

16. Neither John Willy nor anyone in his party cleared combustible material, if any from the fireplace.

17. As a result of the Gold Creek fire which started on September 1, 1974, plaintiff State of Idaho suffered property damage to school endowment land in the sum of $1,764.72, and plaintiff State of Idaho and Clearwater-Potlatch Timber Protective Association expended $153,-098.55 for fire suppression costs, for a total of $154,867.27. Subject to $60,000 dispute as to charge for certain items.

18. Jurisdiction as to Kelly White exists by reason of his residence in the State of Washington and that the amount of controversy exceeds $10,000.00.

19. The Dworshak Reservoir campsites were open to the public for recreational use without charge. Department of Army Contract No. DACW68-68-C-0078 with Clearwater-Potlatch Timber Protective Association, a copy of which is attached hereto as Exhibit "D" and made a part hereof by reference as though fully set forth herein.

Opposition

Office - Supreme Court, U.S.
FILED
JUN 29 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1961

In the Supreme Court of the United States

OCTOBER TERM, 1981

GORDON C. TROMBLEY, DIRECTOR, IDAHO DEPARTMENT OF LANDS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Although the petition raises two issues, only one of them is relevant to the United States as respondent. See note 7, *infra*. Accordingly, the United States will address only the following question:

Whether the State of Idaho may recover fire suppression costs under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, where the State, pursuant to its statutory and contractual obligation to provide fire protection, incurred expenses in fighting a fire allegedly caused by the United States.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1961

GORDON C. TROMBLEY, DIRECTOR, IDAHO DEPARTMENT OF LANDS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5-11) is reported at 666 F. 2d 444. The opinion of the district court (Pet. App. 1-4) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1982. The petition for a writ of certiorari was filed on April 23, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On September 1, 1974, a fire started at a campsite within a recreational project adjacent to the Dworshak Reservoir within the State of Idaho (Pet. App. 8). The United States Army Corps of Engineers had been working on the reservoir and had hired respondent Kelly White to construct

primitive campsites to meet the public demand for immediate recreational use of the reservoir. The cause of the fire has never been determined (*ibid.*).

Pursuant to both a statutory requirement to protect all land in the State from fires (see Idaho Code § 38-101 *et seq.* (1977 & Cum. Supp. 1981)) and a contractual obligation to the Corps of Engineers to provide fire protection to Dworshak Project lands (Pet. App. 7-8), the State of Idaho took action to control and extinguish the fire. The State thereby allegedly incurred expenses in excess of $150,000 (*id.* at 8).

Under Article 4 of the fire protection contract, the State waived "all claims * * * for compensation or reimbursement for loss [or] damage" occurring in performance of the contract (Pet. App. 7-8). Notwithstanding this provision in the contract, petitioners, after exhausting administrative remedies, filed suit against the United States under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.* (FTCA), in the United States District Court for the District of Idaho to recover $153,098.55, the amount the State allegedly spent to fight the fire, as well as damages of $1,764.72 for actual injury to 30 acres of state-owned land.[1] Petitioners alleged that the United States had negligently designed and maintained the campsites and had negligently inspected the work of the contractor who built the Dworshak Reservoir campsites. Petitioners also sued the government contractor, respondent White, for his alleged negligence in constructing the campsites (*id.* at 8).

After trial, the district court dismissed petitioners' suit against the United States on the alternative grounds that fire suppression costs are not recoverable under the FTCA and that the release clause in petitioners' fire suppression

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[1]The claim for damages to Idaho land was settled prior to the district court's entry of judgment (Pet. App. 2).

contract with the Corps of Engineers barred the claim (Pet. App. 1-2).[2]

The court of appeals affirmed (Pet. App. 5-11). The court held that under its prior rulings fire suppression costs are not recoverable against the United States under the FTCA. *People of California* v. *United States,* 307 F. 2d 941 (9th Cir. 1962), cert. denied, 372 U.S. 941 (1963); *State of Oregon* v. *United States,* 308 F. 2d 568 (9th Cir. 1962), cert. denied, 372 U.S. 941 (1963). Since the court of appeals found that the suit clearly was not proper under the Act, it declined to consider the alternative holding of the district court concerning the contractual waiver of the State's right to sue (Pet. App. 10).[3]

ARGUMENT

Petitioners contend (Pet. 6-12) that the court of appeals erred in holding that fire suppression costs are not "money damages * * * for injury or loss of property" within the meaning of 28 U.S.C. 1346(b). Petitioners, however, cite no decision holding that fire suppression costs are recoverable under the Federal Tort Claims Act. This is because the Ninth Circuit is the only court of appeals that has ruled on this infrequently-litigated issue,[4] and it has held repeatedly

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[2]The district court did reach the merits of petitioners' negligence claim against the contractor, however, and found that the contractor had exercised due care and therefore was not liable to petitioners (Pet. App. 9).

[3]The court of appeals also affirmed the judgment dismissing the claim against the contractor on the ground that the district court lacked jurisdiction over that suit (Pet. App. 10-11).

[4]What the Ninth Circuit observed in 1962, when it first decided this issue, is equally true today: "[W]e are unable to find a single instance in the history of litigation involving the Tort Claims Act where recovery was permitted in the absence of injury to [the plaintiff's] person or property." *People of California* v. *United States, supra,* 307 F. 2d at 944. See also *Ray* v. *United States,* 402 F. Supp. 40, 43 (D.S.C. 1975).

that expenses incurred by a state in fighting a forest fire are not within the coverage of 28 U.S.C. 1346(b). See *State of Oregon* v. *United States, supra; People of California* v. *United States, supra.* See also *County of San Diego* v. *Castillo,* 665 F. 2d 1051 (9th Cir.), cert. denied, No. 81-1331 (Mar. 22, 1982). Since the decision of the court of appeals is a reasonable interpretation of the relevant statutory language and does not conflict with any decision of any other court, review by this Court is unwarranted.

Petitioners attempt (Pet. 9-11) to avoid the *California* and *Oregon* holdings by characterizing their suit as one for "mitigation damages." As the court of appeals correctly held (Pet. App. 10), however, this exercise in semantics does not convert petitioner's claim for expenses into one for money damages for injury or loss of property that is required by Section 1346(b).[5] Moreover, petitioners' actions costing in excess of $150,000 were not undertaken to mitigate their $1,764.72 damages claim, but, instead, petitioners were acting pursuant to a comprehensive statutory scheme to provide fire protection. Idaho Code § 38-101 *et seq.* (1977 & Cum. Supp. 1981). Under these circumstances, it cannot be said either that the petitioners were actually

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[5]The only FTCA decision by a court of appeals cited by petitioners, *United States* v. *State Road Department,* 189 F. 2d 591 (5th Cir. 1951), cert. denied, 342 U.S. 903 (1952), did not involve mitigation costs at all. In that case the United States had caused injury to the State's bridge, and the court held that costs incurred "to maintain the regular flow of traffic is so directly related to the injury to the bridge and such a well understood and necessary consequence of such injury that such expense should be deemed legally a part of the damages sustained by the injury to the permanent bridge." 189 F. 2d at 595-596. Thus, the court concluded that the claim was one for money damages from injury to property. Apart from the questionable validity of the decision, it is clear that it provides no support for petitioners' claim. Fire suppression costs are in no way integrally related to the property damage actually caused by the fire.

seeking mitigation damages or that they could conceivably have a cause of action for such damages.[6]

CONCLUSION

As limited to Question One,[7] the petition for a writ of certiorari should be denied.

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[6]Petitioners' argument (Pet. 12) that principles of reciprocity dictate that they be allowed to recover their fire suppression costs from the United States is frivolous. The FTCA is a limited waiver of the federal government's immunity from suit, which cannot be expanded by the courts; only Congress has the power to relinquish the sovereign immunity of the United States. *Dalehite* v. *United States*, 346 U.S. 15, 30 (1953). Thus, petitioners' appeal to principles of reciprocity should be directed to Congress.

[7]If the Court declines to review Question One in the petition, then the United States has no further stake in the outcome of this specific litigation. The second question presented in the petition regarding pendent party jurisdiction in FTCA cases is, however, a matter of some general concern to the government since the United States always is a defendant in these cases (Pet. i).

We agree with petitioners that there appears to be a conflict between the decision below, which follows the Ninth Circuit's holding in *Ayala* v. *United States*, 500 F. 2d 1196, cert. granted, 434 U.S. 814 (1977), cert. dismissed, 435 U.S. 982 (1978), and the alternate jurisdictional holding in *Dick Meyers Towing Service, Inc.* v. *United States*, 577 F. 2d 1023, 1024 n.1 (5th Cir. 1978). But we submit that this case is an inappropriate vehicle for resolving this infrequently-litigated issue. With regard to petitioners' underlying FTCA claims, the first—for injury to state land—was settled prior to judgment and the second—for fire suppression costs—was outside of the federal court's jurisdiction. If the district court had properly disposed of the jurisdictional issue at the outset of the litigation, the claim for injury to the State's land probably would have been settled immediately, and there would have been no federal claim remaining. In that circumstance the district court would have been obliged to dismiss the state law pendent party claim, even if the Ninth Circuit did not have a rigid rule against use of pendent party jurisdiction. See *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726 (1966). Indeed, even if petitioners' first claim against the United States were not settled, it still would have been a proper exercise of discretion to dismiss the pendent party claim because it would have become "substantially predomina[nt]" in terms of proof, issues and relief

Respectfully submitted

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requested. *Ibid.* Thus, the court of appeals' decision in effect simply places the litigants in the position they would have occupied had the district court disposed of the issue of FTCA jurisdiction prior to trial.

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